Filed 8/25/04 P. v. Mar CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES ALLEN MAR,

Defendant and Appellant.

F042727

(Super. Ct. No. SCO68695A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Arthur E. Wallace, Judge.

Carlo Andreani, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Clayton S. Tanaka and David A. Rhodes, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

This appeal challenges the trial court's denial of the defendant's *Romero* motion (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*)) seeking to strike findings he had suffered two prior felony convictions for purposes of the three strikes sentencing scheme. We will affirm the judgment.

BACKGROUND

In 1997, a jury found James Allen Mar guilty of two offenses: obstruction of a peace officer in the performance of his or her duty, and obstruction of a peace officer resulting in serious bodily injury (Pen. Code, §§ 69 and 148.10, respectively).[1] The trial court then found true allegations Mar had suffered two prior violent or serious felony convictions within the meaning of the three strikes law (§ 667, subds. (b)-(i)), and had served a prior prison term (§ 667.5, subd. (b)). It sentenced him accordingly to a term of 26 years to life in prison.

In a previous appeal, we affirmed the judgment against Mar's contention, among others, that the trial court had abused its discretion by requiring him to wear an electronic stun belt during trial, and during his testimony in particular. (*People v. Mar* (2000) 77 Cal.App.4th 1284, review granted on the stun belt issue on June 2, 2000, S086611.) The California Supreme Court reversed our decision, and remanded with directions to remand the matter to the superior court for a new trial. (*People v. Mar* (2002) 28 Cal.4th 1201, 1230.)

The circumstances of Mar's offenses are set out in detail in the Supreme Court's decision. (*People v. Mar*, *supra*, 28 Cal.4th at pp. 1206-1209.) To summarize, Mar was taken into police custody, at his own instance and without incident, for a parole violation, but then became agitated and combative when denied an opportunity to phone his parole officer. When officers attempted to move Mar into a specially-padded "'detox'" cell, a fight occurred during which one of the officers injured his hand when he hit Mar on the head.

On December 27, 2002, pursuant to a plea agreement, Mar pleaded guilty to one count of obstruction of a peace officer resulting in serious bodily injury (§ 148.10), and

---

[1] All further statutory citations will refer to the Penal Code.

admitted *three* prior strike allegations and one prior prison term allegation.[2] In exchange, the prosecution moved to dismiss a second prior prison term allegation attached to this count, and to dismiss the only other count (for simple obstruction) and related allegations. The court accepted Mar's change of plea. Sentencing was set for January 27, 2003.

Prior to sentencing, the defense submitted a 20-page "statement in mitigation" in which it asked the court to dismiss two of Mar's three prior strike convictions on either of two grounds. First, it argued Mar's Texas and Colorado convictions were for offenses that would not necessarily have been strikes if committed in California. Alternatively, it asked the court to exercise its discretion under section 1385 and *Romero* to dismiss the strike priors "in furtherance of justice."

Mar's *Romero* motion in turn was based on several considerations, including three worth noting here. The first and most prominent was his mental condition at the time of the offense. Mar had undergone psychological evaluations in connection with his trial in 1997 (see § 1368; Evid. Code, § 1017), which indicated he may have been suffering from a "'methamphetamine induced psychotic disorder'" when he was arrested.

Second, Mar had received treatment for his mental problems while incarcerated for the previous six years for his 1997 offenses, which treatment, he said in a letter to the court, had given him "much insight" into himself, and a resolve to stay out of trouble in the future. This claim was reinforced by a letter from Marilynn Keith, a volunteer at a

---

2 On remand in 2002, Mar was originally charged with the same two offenses of which he was convicted in 1997, and the same two prior strike convictions were alleged: a 1989 California conviction for assault with a deadly weapon on a peace officer (former § 245, subd. (b), now subd. (c)); and a 1982 federal conviction in Texas for bank robbery. On December 27, 2002, the same day Mar entered his change of plea, the court granted the prosecution's motion to amend the information to allege a third prior strike: a 1981 conviction in Colorado for second degree burglary. Mar admitted these three strike allegations.

homeless shelter, who wrote that in the 14 years she had known Mar, he had become "a good friend, a helper, a good young Christian man who was trying to 'make it' …." Ms. Keith explained that Mar had worked as a volunteer at the shelter doing maintenance and repairs, and she had been impressed "with his ability to help the kids play well together instead of fighting." Keith expressed the hope that Mar, if released from prison, would "encourage others who are incarcerated to begin turning their lives over to Christ, as he has …."

Third, information turned over to the defense in response to a *Pitchess* motion (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531) had disclosed complaints against two of the officers involved in the jailhouse fight with Mar. A copy of a report by "Wallace Investigation's [*sic*]," a firm hired by the defense to interview some of the complainants, was submitted to the court at the sentencing hearing.

The court, at the outset of the hearing, stated it had read and considered the 1997 probation officer's report; a 2003 supplementary probation officer's report; the defense's statement in mitigation; Marilynn Keith's letter; a psychological evaluation by Michael Perrotti, Ph.D in 1997; and the report by Wallace Investigations.

At the sentencing hearing, following argument, the court ruled Mar's 1982 Texas conviction, but not his 1981 Colorado conviction, qualified as a strike under California law. Turning to the *Romero* motion, the court began by reviewing Mar's criminal history, and concluded: "I have a hard time finding that there is a significant gap in the conduct of the defendant over a course of time that would suggest that maybe he has this behind him."

Moreover, the court continued, Mar's present offense "appears to be a reasonably serious event, as well."

> " … The Court notes the defendant … apparently was cooperative with the officers, at least to the point of his transport to the Taft jail facility; but after being apparently brought to that facility and placed in the cell area, he became agitated.… And as a result of him becoming agitated, he began

cursing the officers and making threats against the officers, and ultimately it was determined that he should be extracted from the cell he was in and placed in another cell.…

" … [A]nd while the defendant takes the position that he was being passive in the course of that[,] and it was the officer's aggression that caused the officer's injury[,] and therefore this particular charge isn't as serious as it appears to be, I'm not convinced of that.…

"It's the defendant's position he was rushing out of the cell to lay down so he could be cooperative. It's the officer's position … that Mr. Mar was being aggressive and resistive in that attempt to remove him from the cell, had attacked one of the officers …. [¶] …. [¶]

"So there's nothing about this particular offense that should be minimized for the purpose of applying the criteria set forth in Romero and its progeny …. So I'm having a difficult time finding a bases [*sic*] on which to favorably consider a Romero request.

"There are other factors that the Court has thought about. One, of course, is the defendant did enter a plea in this matter. He acknowledged wrongdoing by doing so, and the Court certainly would consider that as something that might suggest that the defendant, particularly over the past six years or so that he's been in the custody of the Department of Corrections, may have had some change in attitude that led to his ultimate acknowledgment of wrongdoing and the entry of a plea before this court for purposes of sentencing.

"The Court is also aware of the fact that the defendant has had some significant mental problems …. And while that mental condition did not in any way rise to the point of providing a defense to the defendant or even establishing … that the defendant was not competent to proceed in these matters …, it is a factor that the Court can and does consider as being somewhat in mitigation of the responsibility for this particular offense, but not to the point of … depreciating the seriousness of this offense ….

"So the Court really finds no good basis on which to consider striking one of the two remaining strikes and is, under the circumstances, disinclined to do so.…

"The Court, in reviewing the circumstances in mitigation and in aggravation, notes no mitigating circumstances cited [in the probation officer's report]. However, the Court has mentioned some factors that the Court is considering, and that is his plea and acknowledgment of

> wrongdoing as well as the fact that he may have been suffering a mental condition that would somewhat depreciate the seriousness or the culpability for this unwarranted attack on the officer.
>
> "Circumstances in aggravation, however, include the fact that the defendant has established a pattern of violent conduct with his bank robbery conviction, the assault on a peace officer conviction, and, for that matter, the number of commercial burglaries that were snatch and grab in the presence of the people [working in] the particular establishments.
>
> "The defendant's prior convictions are numerous. He was on parole status when he committed this offense. His prior performance on felony probation, federal probation, federal parole, state parole, has all been unsatisfactory in that he's failed to abide by set terms and has continued to reoffend."

On this basis, the court agreed to strike one of Mar's prison priors, but declined to strike either of his strike priors. It sentenced Mar accordingly to a prison term of 25 years to life, plus a one-year enhancement. This appeal followed.

DISCUSSION

Mar challenges his sentence on three grounds. He contends: (1) the trial court's "finding of only two mitigating factors denied [Mar] an informed exercise of [the court's] section 1385 discretion"; (2) Mar's trial counsel was ineffective for providing the court with "no more than 'a hollow shell' of the mitigating factors necessary for a favorable exercise of [the court's] section 1385 discretion"; and (3) the court's refusal to vacate one or more strike findings was an abuse of discretion because, among other things, the court "ignored or rejected mitigating factors established as a matter of law." We disagree on all points.

The common theme in all these claims, plainly, is that the court was not aware of, or failed to give appropriate weight to, other factors that, *as a matter of law*, would have tilted the balance in favor of dismissing one or both of Mar's prior strikes. Mar asserts:

> "Here, there were, at least, seven additional mitigating circumstances as a matter of law. First, [Mar] had been denied his constitutional right to make a telephone call contrary to California due process [citation] and

> Fourteenth Amendment Due Process. [Citations.] Second, subsequent discovery led to exculpatory *Pitchess* information concerning the involved officers. Third, Mar was unconstitutionally subjected at trial to the devastating stun belt restraint. [Citations.] Fourth, [Mar] grew up without his father, who was an alcoholic. [Citations.] Fifth, [Mar] had honorably served his country in the United States Air Force. As American men and women currently sacrificially [*sic*] their very lives within Afghanistan and Iraq in the defense of freedom and liberty, any reasonable person would conclude that [Mar's] honorable military service was a mitigating factor. Sixth, [Mar] had volunteered doing repair in a homeless shelter and also helped children play peacefully. [Citation.] Seventh, [Mar] has turned his life over to Jesus Christ. [Citations.]"

Of course, merely asserting the existence of these factors does not make them true nor, even if true, do they necessarily reduce the significance of the defendant's conduct. (See *People v. Regalado* (1980) 108 Cal.App.3d 531, 538.) Indeed, it is meaningless to proclaim that a particular circumstance is a mitigating factor as "a matter of law," at least if the point intended is that the defendant's sentence *must* be reduced as a result, because the trial court has very broad discretion to weigh various factors in light of each other and the particular facts of the case. (*Id.* at p. 539.)

Moreover, we presume the trial court was aware of, and considered, Mar's seven factors because they appeared in one or another of the documents before the court at the sentencing hearing. "'A trial court may minimize or even entirely disregard mitigating factors without stating its reasons.' [Citation.] Further, unless the record affirmatively reflects otherwise, the trial court will be deemed to have considered the relevant criteria, such as mitigating circumstances, enumerated in the sentencing rules." (*People v. Zamora* (1991) 230 Cal.App.3d 1627, 1637; *People v. Oberreuter* (1988) 204 Cal.App.3d 884, 888.) Mar points to nothing in the record that even suggests, much less establishes affirmatively, that the court was unaware of his seven mitigating circumstances. His real complaint, then, is that the court did not give them the weight he thinks they deserved.

We review the court's decision for an abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 373 (*Carmony*).)

"In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, '"[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve the legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review."' [Citations.] Second, a '"decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.'"' [Citations.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it.

"Because 'all discretionary authority is contextual' [citation], we cannot determine whether a trial court has acted irrationally or arbitrarily in refusing to strike a prior conviction allegation without considering the legal principles and policies that should have guided the court's actions. We therefore begin by examining the three strikes law.

"'[T]he Three Strikes initiative, as well as the legislative act embodying its terms, was intended to restrict courts' discretion in sentencing repeat offenders.' [Citation.] To achieve this end, 'the Three Strikes law does not offer a discretionary sentencing choice, as do other sentencing laws, but establishes a sentencing requirement to be applied in every case where the defendant has at least one qualifying strike, unless the sentencing court "conclud[es] that an exception to the scheme should be made because, for articulable reasons which can withstand scrutiny for abuse, this defendant should be treated as though he actually fell outside the Three Strikes scheme."' [Citation.]

"Consistent with the language of and the legislative intent behind the three strikes law, we have established stringent standards that sentencing courts must follow in order to find such an exception. '[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, "in furtherance of justice" pursuant to [section 1385], or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.' [Citation.]

> "Thus, the three strikes law not only establishes a sentencing norm, it carefully circumscribes the trial court's power to depart from this norm and requires the court to explicitly justify its decision to do so. In doing so, the law creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper." (*Carmony*, *supra*, 33 Cal.4th at pp. 376-378.)

We find nothing extraordinary in the present case that would mandate a departure from the normal three strikes sentencing requirements. To the contrary, Mar appears to be "'an exemplar of the "revolving door" career criminal to whom the Three Strikes law is addressed.'" (*Carmony*, *supra*, 33 Cal.4th at p. 379.) He has been out of custody less than two years total since his 1981 conviction for burglary, and had been paroled barely a month before committing the present offense. The court's decision not to vacate a strike finding was neither arbitrary nor irrational, and did not constitute an abuse of discretion.

It follows Mar's trial counsel was not ineffective simply for choosing to focus the court's attention on some factors rather than others. (See *People v. Majors* (1998) 18 Cal.4th 385, 403 [on direct appeal, to prevail on claim for ineffective assistance, record must affirmatively show lack of rational tactical purpose for counsel's act or omission].) We find, in fact, that trial counsel did a commendable job under the circumstances.[3]

---

[3] We have previously denied Mar's petition for writ of habeas corpus, brought on the ground his trial counsel was ineffective (for reasons different from those Mar asserts on appeal). (*In re Mar* (Apr. 22, 2004, F044891) [nonpub. opn.].) Mar asks us to take judicial notice of the petition, for the purpose evidently of adding the claims he makes in the petition to those he makes on appeal. The request is denied.

DISPOSITION

The judgment is affirmed.

_____
Buckley, J.

WE CONCUR:

_____
Dibiaso, Acting P.J.

_____
Harris, J.